IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 163

JOHN BRENTON PRESTON,

Petitioner,

—v.—

UNITED STATES,

Respondent.

BRIEF FOR PETITIONER

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CITATIONS

CONSTITUTIONAL PROVISIONS

STATUTES

MISCELLANEOUS

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Opinions Below

The oral opinion of the trial judge on certain of the issues raised herein appears in the Transcript of Record at pages 26-27 and 170-171. The opinion of the Court of Appeals is reported at 305 F.2d 172.

Jurisdiction

The judgment of the Court of Appeals was entered on July 23, 1962 (R. 309), and a petition for rehearing was denied on August 31, 1962 (R. 310). The petition for writ of certiorari was granted by this Court on May 27, 1963. 373 U.S. 931. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

Questions Presented

1. Whether, under the Fourth Amendment to the United States Constitution, certain evidence that was seized by state officers after a search, without a warrant, of a car in which petitioner was located at the time of his arrest should have been excluded in the subsequent federal criminal proceeding against him. The subordinate questions are:

   a. Whether the arrest without a warrant was invalid either because the crime of vagrancy was not committed in the officers' presence, or because the officers did not have probable cause, or because the vagrancy statute under which the arrest was made is unconstitutional, and

   b. Whether the search and seizure were incident to the arrest.

2. Whether, under the Sixth Amendment to the United States Constitution, petitioner was deprived of the effective assistance of counsel by the appointment of two counsel to represent him and two co-defendants jointly.

Constitutional Provisions Involved

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Sixth Amendment to the Constitution of the United States provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Statutory Provisions Involved

Section 436.520, Kentucky Revised Statutes, provides:

"(1) Any person guilty of being a vagrant shall, for the first offense, be fined ten dollars or imprisoned for thirty days, or both. For the second and each subsequent offense, he shall be imprisoned for sixty days.

"(2) 'Vagrant' as used in subsection (1) of this section and KRS 436.530 means:

"(a) Any able-bodied male person who habitually loiters or rambles about without means to support himself, and who has no occupation at which to earn an honest livelihood; or

"(b) Any able-bodied male person without visible means of support who habitually fails to engage in honest labor for his own support or for the support of his family, if he has one; or

"(c) Any idle and dissolute able-bodied male person who purposely deserts his wife or children, leaving any of them without suitable subsistence or suitable means of subsistence; or

"(d) Any able-bodied person without visible means of support who habitually refuses to work, and who habitually loiters on the streets or public places of any city."

Section 436.530, Kentucky Revised Statutes, provides:

"All peace officers shall keep a watch for vagrants at places where they are accustomed to congregate. If any of these officers has reason to believe that a vagrant habitually infests a public place or street, he shall warn the vagrant to leave that place and go to work. If two or more vagrants habitually loiter about any street or public place, the officer shall disperse them, using no more force than is reasonably necessary for that purpose."

Section 204.060, Kentucky Revised Statutes, provides:

"Every person going about begging, or staying in any street or other place to beg, shall, on the warrant of the county judge, be sent to and kept at the poor-house. If such person is a male, and able to work, he may be proceeded against under the vagrant laws."

Section 36 of the Kentucky Criminal Code provides:

"A peace officer may make an arrest—

"1. *In obedience to warrant.* In obedience to a warrant of arrest delivered to him.

"2. *Without a warrant; when.* Without a warrant, when a public offense is committed in his presence, or when he has reasonable grounds for believing that the person arrested has committed a felony."

Statement

Petitioner, together with three other persons, was indicted on a charge of conspiring to rob a federally insured bank in Berry, Kentucky, a violation of 18 U.S.C. 2113 (R. 1). He and two co-defendants were tried together and convicted, the fourth person apparently having eluded arrest. The principal issue on this review is whether certain evidence admitted at the trial was obtained by an unconstitutional search and seizure.[1]

Prior to trial, defendants' court-appointed counsel[2] moved to suppress as evidence a number of articles that had been taken by the police from an automobile owned by one of the defendants (R. 2-3). After a pre-trial hearing, this motion was denied (R. 26). It was unsuccessfully renewed both at the conclusion of the Government's case and at the conclusion of the trial (R. 168, 253-254).

For purposes of this review, the circumstances relevant to the search and seizure issue are established principally through the testimony of the police officers who arrested defendants and conducted the search and seizure. Although some of that testimony was controverted at the trial by the defendants, and although the trial judge made no findings of fact, we assume that he resolved conflicts in testimony against the defendants. In addition to the testimony of the officers, however, certain testimony of the defendants that was not controverted by the government may be relevant, although it was not so regarded by the Court of Appeals or the trial judge.

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[1] We discuss in addition an issue, deprivation of effective assistance of counsel, which was not raised in the courts below but which this Court may wish to consider. See *infra*, pp. 54-57.

[2] Two attorneys were appointed to represent all three defendants jointly (R. 5).

The testimony of the officers, which was substantially the same at the pre-trial hearing and at the trial,[3] established the following facts:

On January 20, 1961, in the city of Newport, Kentucky, two local patrolmen in one police cruiser and two detectives in another received radio calls shortly before 3 a.m. instructing them to drive to a certain address to investigate the occupants of a parked car (R. 7, 9, 11, 12, 14, 17, 19, 34, 40). This order was prompted by a phone call from a person whose name was not given to the officers or, for all that appears, to the person at headquarters who received the call (R. 12, 18, 40). The substance of the call, as it was relayed to the officers making the investigation, was that the car had been parked at the same place, apparently with the men in it, for about five hours, and that the men were "acting suspicious" in that, as the only officer who testified with more particularity put it: "[T]hey just set around, one of them got out of the car and left and then came back. That was all" (R. 9, 12, 14, 18, 19, 40).

So far as appears, none of the officers had known any of the men before, so that the telephone call was the only information they had when they arrived at the parked car.[4]

The location where the car was parked was in the business district of the city (R. 11, 18). Nearby was a night club which apparently closed at 3 a.m., the marquee of which was still lit (R. 13, 18, 37, 56). It was not unusual for cars to be parked in that area at that time of the morning, and

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[3] Two of the officers (Ciafardini and Dotson) testified both at the hearing and at the trial; one (Quitter) testified only at the trial; and the other (Colston) testified only at the hearing. There was no material discrepancy in testimony among these witnesses.

[4] Two of the officers testified they had not seen any of the men before (R. 11, 60), and the other officers neither stated nor implied that they had.

other cars in fact were there; but there were no other people in the vicinity and "there wasn't too much traffic" (R. 37, 56-57).

When the officers arrived, they questioned the men in the car, who were petitioner and his two co-defendants, John Sykes and Kenneth Strunk. The questioning disclosed that all of them had lived in the area for some time, that they were unemployed, and that Strunk had been out of work for six months, though he had worked previously (R. 9, 11, 17, 35, 42, 58). Sykes said that he had purchased the car the day before, but he did not have the title-documents with him (R. 17, 22, 41, 59, 65). (His statement was, however, true (R. 59, 117, 118).) Among the three, they had only 25 cents with them (R. 9, 22, 35, 41).

In response to questions about what they were doing at that location at that time of morning, the men gave answers that the officers considered "evasive." They stated that they were waiting for a truck driver named Sexton who was to stop in Newport; but they could not give the name of the company for which he worked, they could not describe the truck, they did not know what time he would arrive, and they could not explain to the officers' satisfaction why they were parked a block away from the establishment where they said Sexton usually stopped for a cup of coffee (R. 9, 14-15, 16, 22, 35, 41).

The officers asked whether any of them had been arrested, and Sykes admitted that he had been arrested once for breaking and entering (R. 42).

On the basis of this evidence, the officers arrested the men for vagrancy. More particularly, detective Ciafardini said that they had "vagged" the men because of their evasive answers, and that the men's behavior had aroused his

suspicion that they "[w]ere up for no good."[5] Officer Dotson also stressed the unsatisfactory responses of the men and agreed that their being parked for five hours until 3 a.m. was "suspicious"[6] (R. 21-22). Detective Quitter,

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[5] He stated:

". . . When we were questioning them, their answers were evasive. They couldn't give us the right answers. They didn't know the make of the truck that was coming in and what time this fellow Sexton was supposed to come in and we asked them about—'Well, how do you know, how are you going to see the guy?' They said, 'Well, he usually stops down at one of the restaurants a square below.' . . .

"Q. Did you ask them what they were doing that far away if the fellow was supposed to stop at the other location?

"A. Yes, sir.

"Q. Did they give you any answer?

"A. Evasive again. That is why we 'vagged' them.

"Q. Did they have any funds on their person?

"A. Twenty-five cents between the three.

"Q. Did you question them as to employment?

* * * * *

"A. Strunk said he hadn't worked for six months and the other two said they hadn't been working.

"Q. Did anybody tell you who owned the automobile?

"A. Sykes said that he had purchased the automobile that day or the day before, but he had no papers to show that the automobile was owned by him.

* * * * *

"Q. Did their answers or demeanor at the time you questioned them arouse your suspicions?

"A. Yes, sir.

"Q. Your suspicions for what? What kind of suspicions?

"A. Were up for no good" (R. 16, 17, 18).

[6] He testified in part as follows:

"Q. . . . [D]id they arouse your suspicions in any manner?

"A. Yes, sir. They were parked there at that hour of the morning was suspicious, yes, sir, and we received a call on the complaint . . . . [T]hey had been there since 10 p.m.

* * * * *

"Q. Did they give any logical excuse for being in that area at that time of the morning?

"A. Yes, sir. They said they were waiting for a truck to come through; they were out of a job and they said they were

while mentioning both the information concerning unemployment and the vagueness of the men's responses as bases for the arrest, testified that the men "look[ed] suspicious" to him. Only officer Colston appeared to place primary

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waiting for a truck and we asked them the identity of the truck, which they couldn't give us the identity of the truck, and we asked them who the man was they were supposed to meet and they couldn't—they just said they was supposed to meet a man coming through there on a semi-truck, was supposed to meet them down at the restaurant down at the next corner and they didn't have no money on them—I think a quarter is all one of them had or something like that.

"Q. Did they have any papers to show that any one of them owned the automobile?

"A. No, sir" (R. 21-22).

He stated:

". . . The three men . . . were in the car and we asked them what they were doing here, they were very vague as to why they were there and eventually one of them stated this, that they were waiting for a man who was driving a truck by the name of Johnny Sexton. We asked him who this Johnny Sexton worked for and they didn't know that; what kind of truck he drove, they didn't know that; and we asked them about the ownership of the car. Sykes said he owned the car. When we asked him when he had bought it, he said the day before and we said, 'Well, how would Johnny Sexton know you, he doesn't know the car?' And he stated, 'Well, he usually goes down at the next corner and stops in for a cup of coffee.' So we said, 'Well, why didn't you park down there?' Well, he couldn't give any explanation of that. We asked him about working. Neither one had a job. One of them I think stated that he hadn't worked for about six months. So we placed a charge of vagrancy on them.

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"Q. Do you know how much money they had on their possession at the time they were searched.

* * * * *

"A. A quarter between them.

* * * * *

"Q. [on cross-examination] And were they—did they look suspicious to you?

"A. Well, I would say with the call that we received, yes" (R. 35, 38).

stress upon the fact that the men were unemployed, although he too testified as to the inability of the men to provide any details as to the person whom they said they were to meet.[8]

After the arrest, the men were searched for weapons and taken to police headquarters (R. 10, 42, 13, 15, 20, 35). After being booked on the vagrancy charged, they were searched again and the officers "started to interrogate them" (R. 42, 35, 64). The search of Preston revealed a piece of twine in his hip pocket (R. 17, 42). Also, the police discovered that he had an artificial leg, which he removed upon their request and which contained two band-aids and a safety razor (R. 37, 43).

Sykes' car, which had not been searched at the time of the arrest, had been driven by one of the officers to the police station, which was about eight blocks from the place of arrest, and thereafter had been towed to a garage an unspecified distance from the station (R. 10, 12, 13, 62).

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[8] He testified:

"Q. Can you tell the Court why you arrested these men for vagrancy?

"A. Well, in the investigation, talking to them, none of them were employed and they were in the vicinity for some time. Some of them hadn't been employed for six months, one or two of them, so we arrested them for vagrancy.

"Q. Did they have any money on them?

"A. I think some small change is all.

* * * * *

"Q. Did they give you any excuse as to why they were there on the street at that hour of the morning?

"A. They told us they was waiting for a truckdriver, a man who was driving a truck, from Lexington going to Newport.

"Q. Did they tell you what trucking company?

"A. They didn't know what trucking company.

"Q. Did they know what time he would be through?

"A. No. They didn't know what time he would be through.

"Q. Did they knew what route he would be taking?

"A. They said he would come through Newport on 27, that is all they knew" (R. 9-10).

At some point shortly after the booking and the search of the men at the station, Sykes asked for permission to go to the car to get some cigarettes. Permission was refused, but "a little while later" three of the officers secured the keys from the lieutenant who had taken custody of defendants' effects and "went down to search the car" (R. 36, 8, 10, 15, 23, 24, 43).* The record is not explicit as to whether their purpose was to examine the car generally or simply to look for cigarettes, nor does it appear whether the officers told the defendants they were going to search the car. But at any rate there is nothing to indicate that the officers either sought or received consent even to look for cigarettes.

The officers found no cigarettes in the car, but in looking in the glove compartment they discovered two loaded revolvers (R. 15, 21, 23, 43, 60-61). They then tried to open the trunk with the keys, but without success (R. 15, 24, 44). Thereupon, they took the guns back to the station (R. 15), where detective Ciafardini had Sykes brought out again for questioning, "pushed him in a chair and . . . said, 'We have got some talking to do' " (R. 43-44, 61). In the meantime, Ciafardini asked officer Dotson to go back and try to get into the trunk (R. 15, 44, 61).

Dotson, assisted by a man who was apparently an employee of the garage to which the car had been towed, pulled

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* It is not clear whether one of the three, Dotson, actually participated in the search or was simply standing in the vicinity of the car (R. 8, 60-61, 65, 66).

One of the officers implied that the keys had been secured by a search of Sykes (R. 24; see also R. 42). However, if this was so it is not apparent how an officer could have driven the car to the station, unless perhaps the keys were seized when Sykes was searched for weapons at the place of arrest (or unless Sykes was telling the truth when he testified that the car was of the type that can be started without keys (see *infra*, p. 13)). It is also unclear why the car was towed to the garage after having been driven to the station. None of these ambiguities, however, are material.

out the back seat, pushed aside the partition, and crawled into the trunk (R. 15, 62, 64-65, 21, 44). In the trunk, he discovered the articles that, in addition to the guns, are here in question—four caps; two women's stockings, one with eye holes cut into it; five band-aids; one pair of leather gloves; one pair of work gloves; one sock; two pieces of rope; a length of fishing cord; two pillow slips; two shotgun shells; and a 1961 Kentucky license plate with hooks attached to it which could be used to attach it to another plate (R. 20, 23, 36, 37, 44-47).

Although it would seem that the sequence of events described above after the arrest and prior to the search—the trip eight blocks to the station, the towing of the car from the station to the garage, the booking and the search of defendants, and some interrogation—would have taken some considerable time, the three witnesses who testified as to the time lapse between arrest and search agreed that the second search of the auto took place within 15 to 30 minutes after arrest (R. 8, 70, 233). One of these witnesses, moreover, was petitioner.

After the guns were found in the glove compartment, but precisely when is unclear, charges of carrying concealed and deadly weapons were placed against the defendants (R. 16, 17, 24, 52).

The sequence of events leading to the institution of the federal charge against the defendants does not appear in detail in the record. After the searches were completed, however, Sykes confessed to the local police that he and two others—but not petitioner or Strunk—intended to rob a bank in Barry, Kentucky, a town located about 51 miles from Newport (R. 62, 151). Apparently this led the police to call federal agents into the investigation, inasmuch as agents of the Federal Bureau of Investigation interrogated Sykes later on the day of the arrest (R. 138). The articles

that had been seized were turned over to the Bureau agents the next day (R. 16, 44). The charges of vagrancy and carrying a concealed and deadly weapon were never brought to trial, but rather were, as the clerk of the police court put it, "adopted" by the federal government (R. 25).

The testimony of the petitioner and his co-defendants, insofar as it related to the arrest and search, was in part in conflict with the testimony of the officers. Thus, for example, Sykes stated that they had been parked for only 2½ hours rather than 5 hours; that the glove compartment had been locked and that he had had no keys with him (the car being of the type that did not require a key if the switch was placed in a certain position); that he had not asked for cigarettes; and that detective Ciafardini knew him and realized that he was not a vagrant, but also knew that he carried a gun and vowed that he would find it if it was in the car. He also testified that he was waiting for his wife's ex-husband to come out of the night club so that he could "whip him" for not paying support money, and he suggested that the persons in the club that had been watching him in the car might have phoned the police (R. 184-186). Petitioner, on the other hand, said that so far as he had been aware the only purpose they had in parking was to wait for a friend of Sykes who might be able to get them a job (R. 225).

As to such testimony, as we have noted, presumably the conflicts were resolved against the petitioner and his co-defendants by the trial judge. However, the defendants did provide facts concerning their economic condition that were not disputed and that their counsel contended were relevant to the arrests for vagrancy, and this testimony was not controverted. Thus Sykes stated that he was married and had four children; that he had been a salesman for a heating concern, from which he had been released less than two

months before the arrest; that he had drawn unemployment compensation from that time until his arrest; that he had looked for a job each day during that period of unemployment; and that he had attempted to earn money by selling cars for a used car dealer (R. 178-180).

Strunk testified that he had lived in Newport for about two years, and in the Cincinnati-Newport area for about 14 years altogether; that he was married and had two children; that he was a furnace mechanic by trade; that he had been laid off from his job over nine months before his arrest; that he had looked for a job without success; that he had drawn unemployment compensation until slightly less than two months prior to his arrest; that he had been able to do some "odd jobs" for his aunts; and that, after his unemployment compensation ran out, his mother had helped him financially (R. 199-200, 213).[10]

Petitioner testified that he had spent most of his life in Kentucky; that he was married and had two children, and that his wife was pregnant and living with her mother; that he had worked as a construction laborer and a musician; that he was employed during the first part of January, 1961, as a bartender; and that on January 7th he was stabbed in a fight and was incapacitated so that he could not work (R. 218-221). The woman in whose house petitioner stayed after his injury (the mother of a friend of petitioner's) verified his testimony as to his physical condition, and one of the FBI agents mentioned that petitioner had "somewhat of a bad cut on one of his fingers" (R. 163, 241).

Both the trial judge (R. 26, 168) and the Court of Appeals regarded the search and seizure as valid because

[10] A minor discrepancy appears here in that the officers testified that Strunk had said he had been unemployed for 6 months rather than 9 months.

incident to a valid arrest. 305 F.2d 172. The Court of Appeals explicitly, and the trial judge implicitly, concluded that the arrest was valid whether or not the crime of vagrancy had actually been committed, as long as the officers had reasonable cause to believe it had been committed. *Id.*, at 175. On this theory, the testimony of the defendants as to their economic status was not material.

As to probable cause for the arrest, the Court of Appeals relied principally upon the statement of the trial judge made when he overruled the motion prior to trial, *id.*, at 175, which was shorter but similar in substance to the statement he made at the close of the government's case, when he said in part:

> "... These men had been parked from 8 or 9 o'clock until 3 o'clock in a business section with apparently no purchase [sic], no reason .... And you or anybody else would place yourself under suspicion. If the police department weren't suspicious of that kind of conduct, you ought to get another police department. You can't wait until a robbery or something occurs and then say, 'We didn't know anything about it.' They had been parked there five hours. They had gotten in and out of that car. At least they had gotten telephone calls—the police station—that these men were acting suspicious. They were afraid of them. Why shouldn't they be? You would be, I would be—parked right there on the side of the street there in the business section of the town, where there were jewelry stores and banks within a reasonable distance, some of the officers went there and questioned them and the more they questioned them the more suspicious they acted; they told them things that weren't true ... so they said, 'Come with me,' and they took them into custody for vagrancy—they gave no reasonable explanation ... (R. 170-171)."

Neither the trial judge nor the Court of Appeals elaborated upon why, assuming the arrest was valid, the search was incident to the arrest. The concurring judge in the Court of Appeals, however, stated that, in his view,

> "... an arrest for vagrancy does not warrant a search extending beyond the person of the vagrant. There would be no reason to search a house or an automobile as an incident to such arrest. An able-bodied person, who is loitering without visible means of support, may be arrested by police officers for vagrancy, his person searched to insure safe custody, but nothing connected with the offense could be found by an extended search." 305 F.2d, at 177.

Inexplicably, however, he concluded:

> "But I believe the search of the car in this case was warranted in that the circumstances. . . . set up probable cause to justify the action of the police officers. One of the purposes for making vagrancy an offense is to prevent crime, as it is considered that criminal action will flow from the mode of life of a vagrant. Therefore, the search . . . was reasonable to ascertain whether the automobile carried illegal instrumentalities which might be used in the commission of a crime." *Ibid.*

Those are the facts relevant to the search and seizure issue. It may not be amiss, however, to note that the introduction of the articles seized from the auto must have had a considerable impact on the jury. Indeed, there would hardly have been any case at all against petitioner absent this evidence.

The trial was a rather lengthy one, and the government attempted to establish a conspiracy and to link petitioner

to it by various pieces of circumstantial evidence. Excluding that evidence which seems so remote as not to be worth mentioning, the evidence against petitioner, in addition to the articles seized from the trunk, was as follows:

First, a bartender testified that, some time after January 1, 1961, while the three defendants and two girls were in a cafe in which he worked, one of them (he could not recall which) told him that "they had a big job planned and never said what it was or anything else" (R. 71-77). In response to the question whether a "big job" might have been something like the installation of a furnace, he conceded that "[i]t could have been anything" (R. 77).[11]

Next, a storekeeper in Berry testified that in early January he had seen Sykes and another person whom he could "fairly well identify" as Preston driving slowly through Berry twice on the same day (R. 79-85). And the cashier of the Berry bank stated that he doubted that any other establishment in Berry would have much money on hand (R. 91).

Finally, an FBI agent testified that petitioner had admitted to him that he had discussed robbing the Berry bank with Sykes and Strunk, but had claimed that this discussion "was in the preliminary stages" (R. 163). (Petitioner denied having said anything to the agent about the Berry bank, and his explanation of what he meant by "preliminary stages" was that Sykes had said he had a chance to make $5,000, and that when he admitted that it was by way of robbing a bank, Strunk stated he didn't even want to hear any more about it (R. 202-203).)

We think it fair to say that, apart from the articles seized, it was only the FBI agent's testimony that even

[11] The court was of the view that this person was "very obviously an unwilling witness" (R. 78).

arguably was sufficient to carry the case against petitioner to the jury both on the question of conspiracy and on the question whether the object of the conspiracy was the bank at Berry. And, it may be added, even if the seized articles be considered, the evidence was still minimal.[12]

These, then, are the relevant facts, as we see the case. On the basis of a *pro se* petition, this Court granted the motion to proceed *in forma pauperis*, granted the petition for *certiorari*, and appointed counsel. 373 U.S. 931.

Summary of Argument

1. Since *Elkins* v. *United States*, 364 U.S. 206 (1960), if a search or seizure by state officers violated Fourth Amendment standards, the articles seized are not admissible in a federal proceeding.

2. The search and seizure in this case were invalid because the arrest was invalid.

a. The Court of Appeals was incorrect in holding that, under section 36 of the Kentucky Criminal Code governing arrests without warrants, the phrase "when a public offense is committed in [the officer's] presence" merely requires that he have had probable cause to believe the offense was being committed. While the probable cause test has been applied by the Kentucky Court of Appeals in false arrest

[12] It perhaps should be noted specifically that Sykes' oral confessions to the police and to the FBI agents, one version of which implicated petitioner, were not admissible against Preston, as the trial judge correctly instructed the jury (R. 63, 144, 147-148, 157, 288). Sykes repudiated these confessions when he testified at the trial, claiming that they had been coerced (R. 186-189).

It may also be noted that there is no basis in the record for any inference that the defendants were about to commit the robbery when they were arrested. As indicated above, the bank was located some 51 miles from the place of arrest.

damage actions against officers, see cases cited *infra*, p. 26, these decisions were placed upon a separate drunkenness and disorderly conduct statute, not upon section 36. In cases where the issue is the legality of a search and seizure incident to an arrest, the Kentucky Court of Appeals has considered the test to be whether the offense actually had been committed in the officer's presence, see cases cited *infra*, p. 27; and the court has explicitly recognized the difference in approach between the two types of cases. *L. & N.R. Co.* v. *Creech*, 218 Ky. 147, 151, 271 S.W. 674 (1927).

And if the question is whether the offense of vagrancy was actually committed, the record establishes that it was not. The testimony of the defendants was undisputed that they all had families, that they all had trades, and that, while they were temporarily out of work, they all had tried to secure employment.

b. Moreover, the officers arrested on a ground not related to the Kentucky vagrancy statute. That statute is not of the type that is designed to permit officers to arrest persons who are abroad at late hours in suspicious circumstances and who fail to make a reasonable explanation. Rather, the Kentucky legislation is basically a "poor law," defining as vagrants those who refuse to work and who loiter about the town. See statute, *supra* p. 3. In this case, however, the officers arrested—and the courts justified the arrests—because they were suspicious of the petitioner and the co-defendants, not because the officers thought they were vagrants within the meaning of the statute. Consequently, the arrest was invalid.

c. Even assuming the officers arrested because of a belief that the individuals had violated the vagrancy statute, and assuming also that the Court of Appeals was correct in viewing the state law test to be whether there was probable cause to believe the defendants were vagrants rather than

whether they actually were, there was still insufficient basis for the arrest. The question as to probable cause is whether the officers could have obtained a warrant, *Wong Sun* v. *United States*, 371 U.S. 471, 479 (1963). The only facts the officers could have presented to a magistrate were that the men were unemployed, that one had been unemployed for six months, that they had only 25 cents among them in the car, and that they had been parked for about five hours. This was insufficient to establish probable cause that the men had "habitually fail[ed] to engage in honest labor," or had "habitually refuse[d] to work," or had "habitually loiter[ed] or ramble[d] about," within the meaning of the statute. Apart from any other consideration, the word "habitually" makes explicit what has been the general view of the courts, *i.e.*, that in a vagrancy prosecution a pattern of action must be established. Here there was no probable cause to conclude that there had been such a pattern of action.

d. The arrest was invalid also because the vagrancy statute is so vague as to be unconstitutional under the Fourteenth Amendment. See *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939), where the Court struck down a state law declaring it a crime to be a "gangster." Such phrases as "habitually loiters or rambles about," "visible means of support," and "idle and dissolute," are "terms so vague that men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Id.*, at 453.

Moreover, inasmuch as the statute, in effect, makes it a crime simply to acquire willingly the status of a pauper apart from any anti-social acts, the law runs afoul of the Eighth Amendment's ban on cruel and unusual punishment as made applicable through the Fourteenth Amendment. Cf. *Robinson* v. *California*, 370 U.S. 660 (1962).

3. Assuming the arrest was valid, the search and seizure were nonetheless invalid.

a. The doctrine of *Carroll* v. *United States*, 267 U.S. 132 (1925), permitting a search of automobiles without a warrant even prior to arrest in appropriate circumstances, is inapplicable, because here the officers had no probable cause to believe that property subject to seizure was in the car, and also because it cannot be said that "it was not practicable to secure a warrant because the vehicle [could] be quickly moved out of the locality or jurisdiction . . . ." *Id.*, at 153.

b. Where the arrest is for vagrancy, the search incident to arrest doctrine should not be applied so as to justify a search beyond that necessary to protect the officers and to prevent escape. The additional basis for such a search that has been recognized by this Court, *i.e.*, to search "in order to find and seize things connected with the crime as its fruits or as the means by which it was committed," *Agnello* v. *United States*, 269 U.S. 20, 30 (1925), is obviously not relevant where the crime charged is vagrancy. *Cf.* decisions barring searches of automobiles in connection with arrests for minor traffic violations, *e.g.*, *People* v. *Mayo*, 19 Ill. 2d 136, 166 N.E. 2d 440 (1960).

c. Assuming that a broader search may be made incident to an arrest for vagrancy, the search and seizure in this case were nonetheless invalid.

First, the search and seizure were not contemporaneous with the arrest nor did they occur at the same place as the arrest, and consequently they were invalid under the principle announced in *Agnello* v. *United States*, 269 U.S. 20 (1925).

Second, there was ample opportunity to secure a warrant; and even under *United States* v. *Rabinowitz*, 339 U.S.

56 (1950), this is still a relevant consideration. Indeed, where both the car and the persons who were in it were in the custody of the police, so that it is indisputable that the police could readily have sought a warrant, we submit that the failure to do so should be controlling. See *United States* v. *Stoffey*, 279 F.2d 924 (7th Cir. 1960); *Shurman* v. *United States*, 219 F.2d 282 (5th Cir. 1955).

Finally, the crime of vagrancy was in fact not committed, as the record establishes; and the Court has consistently regarded the question whether the crime was committed in the presence of the arresting officers as relevant to the validity of an incidental search. *E.g.*, *Harris* v. *United States*, 331 U.S. 145, 155 (1947); *United States* v. *Rabinowitz*, 339 U.S. 56, 64; *Go-Bart Co.* v. *United States*, 282 U.S. 344, 357 (1931).

4. Petitioner was deprived of his right under the Sixth Amendment to effective assistance of counsel by virtue of the appointment of two attorneys to represent him and his two co-defendants jointly. *Glasser* v. *United States*, 315 U.S. 60 (1942). The interests of the defendants were not identical. Sykes had confessed and the articles introduced into evidence were found in his car. But counsel could not freely attempt to disassociate petitioner from Sykes because of their obligation to Sykes. While this issue has not been raised until now, this failure cannot be assigned to petitioner. Moreover, the error is plain; and, in the circumstances of this case where the evidence against petitioner was flimsy, it has a direct bearing upon the correctness of the jury verdict. Consequently, we urge the Court to consider the question if failure to do so would result in affirmance of the judgment.

ARGUMENT

I.

Introduction.

Since the demise of the "silver platter" doctrine, the fact that a search and seizure are made by local officers without participation by federal officers no longer forecloses inquiry into the reasonableness of the search and seizure when the articles seized are proffered as evidence in a federal prosecution. Rather, the question of admissibility turns solely upon whether the search and seizure, "if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment. . . ." *Elkins* v. *United States*, 364 U.S. 206, 223 (1960).[13]

In the case at bar, consequently, the correctness of the judgment under review must be measured by those decisions of this Court bearing upon the right of officers under the Fourth Amendment to search without a warrant incident to arrest. Among those decisions, we take it as undisputed that *Harris* v. *United States*, 331 U.S. 145 (1947), and *United States* v. *Rabinowitz*, 339 U.S. 56 (1950), accord the most latitude to the police. See, *e.g.*, *Abel* v. *United States*, 362 U.S. 217, 235 (1960). But while, as this Court has observed, "[T]here are those [citing the *Harris* and *Rabinowitz* dissents] who think that some of the Court's decisions have tipped the balance too heavily against the protection of that individual privacy which it was the purpose of the Fourth Amendment to guarantee," *Elkins* v. *United States*, *supra*, at 222, and while there appears to be some basis for infer-

[13] No doubt the subsequent decisions in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), and *Ker* v. *California*, 374 U.S. 23 (1963), require the same approach.

ring from several of this Court's opinions that *Harris* and *Rabinowitz* may stand on rather shaky ground, see *Abel* v. *United States*, *supra*, at 235, 248-249; *Wong Sun* v. *United States*, 371 U.S. 471, 480 n. 8 (1963); *Ker* v. *California*, 374 U.S. 23, 41-42 (1963); *Chapman* v. *United States*, 365 U.S. 610, 618 (concurring opinion), 623 (dissenting opinion) (1961), the case at bar can be disposed of without reexamination of *Harris* and *Rabinowitz*. That is, the search and seizure here involved violated the standards of the Fourth Amendment because, in the first place, the arrest was invalid, and, in the second place, the search was not sufficiently related to the arrest even under the *Harris-Rabinowitz* approach to be considered incident to the arrest.[14]

II.

The Search and Seizure Were Invalid Because the Arrest Was Invalid.

It is firmly established, of course, that a search and seizure without a warrant cannot be justified on the basis of a contemporaneous arrest unless the arrest was valid. *E.g.*, *Henry* v. *United States*, 361 U.S. 98 (1959); *Draper* v. *United States*, 358 U.S. 307 (1959). In the case at bar, the arrest was invalid principally because (1) it was not based upon probable cause to believe the defendants had committed the crime of vagrancy, and (2) the vagrancy statute upon which the arrest was grounded is unconstitutional.

A. The Officers Did Not Have Probable Cause to Arrest.

The infirmity of the arrest in this case has a double aspect. Not only did the officers lack probable cause to believe the

[14] As a preliminary matter, it may be noted that, under the principle established in *Jones* v. *United States*, 362 U.S. 257 (1960), there is no problem of standing in this case; and the government has not at any point contended otherwise.

offense of vagrancy, as defined by the Kentucky statute, was being committed, but they arrested on grounds that are not covered by that statute.

1. *The officers' authority to arrest without a warrant.* At the time of the arrest, a peace officer in Kentucky was empowered to arrest without a warrant "when a public offense [was] committed in his presence, or when he [had] reasonable grounds for believing that the person arrested [had] committed a felony." Ky. Crim. Code, § 36.[15]

Thus, assuming that vagrancy—which, of course, is not a felony—is a "public offense" within the meaning of this statute,[16] it would seem from the statutory language that

[15] Since that time, the Kentucky Criminal Code has been repealed. The statutory provision substituted for section 36 authorizes an officer to arrest without a warrant "when a felony or misdemeanor is committed in his presence or when he has reasonable grounds to believe that the person being arrested has committed a felony." Ky. Rev. Stats., § 431.005 (Ky. Acts 1962, c. 234, § 31, effective January 1, 1963).

Presumably this revision was designed to permit arrests where misdemeanors not amounting to breaches of the peace are committed in the presence of the officers. See, *e.g.*, *Lewis* v. *Commonwealth*, 197 Ky. 449, 247 S.W. 749 (1923), where the Kentucky Court of Appeals appears to have construed the "public offense" phrase in section 36 as requiring an act in the nature of a breach of the peace.

[16] This may well be doubtful. While we have found no Kentucky decisions directly in point, in *Lewis* v. *Commonwealth*, 197 Ky. 449, 247 S.W. 749 (1923), the Kentucky Court of Appeals held that a search incident to an arrest in a hotel room for drunkenness was illegal because such drunkenness was not a "public offense," the implication being that in some material way the offense must overtly disturb the public order in order for an officer to arrest without a warrant. Vagrancy, as defined by the Kentucky statute (*infra*, pp. 29-30) and as measured by the actions of the defendants in this case, hardly qualifies under such a standard. On the other hand, it appears that the majority view at common law was that an arrest without a warrant could be made for vagrancy; and the common law rule, of course, prohibited such arrests in the case of misdemeanors not amounting to breaches of the peace. See Wilgus, *Arrest Without A Warrant*, 22 Mich. 673, 674, 703, 704-705 (1924), and cases there cited.

the crime would actually have to be committted in the officer's presence in order to justify an arrest without a warrant, rather than that the officer could arrest simply upon probable cause to believe that the crime was being committed. However, the Court of Appeals in this case held to the contrary, relying upon *Sizemore* v. *Hoskins*, 314 Ky. 436, 235 S.W.2d 1011 (1951). There, in a damage action against an arresting officer, the court held that there could be no recovery if the officer had had reasonable cause for believing the person arrested to be drunk, even though in fact he had not been.

The lower court's view of the Kentucky law does not appear to be accurate. In the first place, the *Sizemore* rule, which has been followed by the Kentucky Court of Appeals in a number of other damage actions, seems to have been based upon the wording of a separate drunkenness and disorderly conduct arrest statute rather than upon section 36. See *Easton* v. *Commonwealth*, 26 Ky. L.Rep. 960, 82 S.W. 996 (1904); *Weaver* v. *McGovern*, 122 Ky. 1, 90 S.W. 984 (1906); *L. & N.R. Co.* v. *Creech*, 218 Ky. 147, 271 S.W. 674 (1927); *Commonwealth* v. *Reed*, 208 Ky. 587, 271 S.W. 674 (1925); *Goins* v. *Hudson*, 246 Ky. 517, 55 S.W.2d 388 (1932). As the court said in *Easton* in disapproving instructions that required a finding of actual commission of the crime rather than mere probable cause, "The instructions of the court correctly state the rule as to arrests for ordinary offenses, but drunkenness and disorderly conduct are placed by the statute on a peculiar ground." 82 S.W. at 997.

In any event, it would hardly seem inevitable that the Kentucky courts would apply the same rule to search and seizure questions as they apply in damage actions. And, as a matter of fact, it seems that they do not. Rather, where the issue is the validity of a search incident to an arrest for a misdemeanor, the Kentucky courts seem to judge the

validity of the arrest only by whether the offense had been committed in the officer's presence. See, *e.g.*, *Spires* v. *Commonwealth*, 207 Ky. 460, 269 S.W. 532 (1925); *Ingle* v. *Commonwealth*, 204 Ky. 518, 264 S.W. 1088 (1924); *Elswick* v. *Commonwealth*, 202 Ky. 703, 261 S.W. 249 (1924). In *L. & N.R. Co.* v. *Creech*, *supra*, the Kentucky Court of Appeals specifically noted this difference in approach when it stated:

> "True, in cases where there is an objection to the admissibility of evidence procured by an illegal arrest and subsequent seizure, the code provisions authorizing arrests without a warrant have been construed with more particularity and perhaps with less liberality in upholding the legality of such arrests. . . ." 218 Ky., at 151.

And *cf. Taylor* v. *Commonwealth*, 274 Ky. 702, 713, 120 S.W.2d 228 (1938), where, in a murder prosecution against an arresting officer, the court required that a finding be made that the offense had actually been committed by the person who was killed by the officer during an attempt to arrest. See also *Stevens* v. *Commonwealth*, 124 Ky. 32, 98 S.W. 284 (1906).

If the question, then, be whether the defendants were actually committing the crime of vagrancy when arrested, plainly this arrest was invalid, for, as we demonstrate in connection with an issue discussed in a later portion of the brief, *infra*, pp. 53-54, there is no basis in this record for concluding that the defendants were actually vagrants.

However, we assume that the Court did not grant *certiorari* primarily to consider local law questions of this sort, as to which it would normally give considerable weight to the decision of the Court of Appeals. See, *e.g.*, *United States* v. *Durham Lumber Co.*, 363 U.S. 522, 526-527 (1960). Consequently, having made our point as to the grave doubt

about this aspect of the lower court decision, we pass on to the more significant problems in the case.

Accepting *arguendo* the correctness of the lower court's view as to the Kentucky law of arrest without a warrant, then, the question is whether the officers had probable cause to believe the petitioner and his co-defendants were committing the crime of vagrancy at the time of arrest.

2. *The Kentucky vagrancy statute.* Vagrancy statutes in this country are, of course, of many different types. It is generally agreed that common to all is the fact that they make a person's status, rather than his actions, the crime; and in this respect the Kentucky statute falls into the general pattern.[17] However, the statute differs in one critically important respect from vagrancy statutes in some other states—it is not designed to forestall crime by apprehending the criminal before he has the chance to commit the crime. Rather, it is essentially a "poor law" with the same primary theoretical basis as the first English vagrancy legislation, *i.e.*, that a person's economic behavior can be so anti-social that criminal sanctions may be brought into play.[18]

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[17] See the following commentaries and the cases cited therein: Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L.J. 1, 6-7 (1960); Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 Harv. L.Rev. 1203 (1953); Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L. Rev. 102, 114-116 (1962); Comment, *Who Is a Vagrant in California*, 23 Cal. L.Rev. 506, 514-518 (1935); Clark & Marshall, Crimes §4.00, at 181 (6th ed. 1958); 3 Wharton, Criminal Law and Procedure §954, at 95 (12th ed. 1957). See also *Edelman* v. *California*, 344 U.S. 357, 364-365 (1953) (dissenting opinion).

[18] See, *e.g.*, Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L.Rev. 102, 104-105, 111 (1962); 3 Stephen, A History Of The Criminal Law Of England 266-275 (1883); Douglas, *op. cit. supra* note 17, at 5-6; Lacey, *op. cit. supra* note 17, at 1206-1209; Foote, *Vagrancy-Type Law and Its Administration*, 104 U. Pa. L.Rev. 603, 615-617 (1956).

"The act of 1904 . . . was intended to punish persons who are habitual loafers without means of support, and who have no trade, calling, or profession." *Tuggles* v. *Commonwealth*, 100 S.W. 235, 30 Ky.L.Rep. 1071 (1907).

Thus, in contrast to vagrancy statutes in many other states, the Kentucky statute does not make it a crime to loiter about at late and unusual hours "without any lawful business" and without being able "to give a good account."[19] Such statutes plainly "are designed to prevent crime and if the officer must wait until a crime is committed, the preventive purposes of the statute wholly fail." *Beail* v. *District of Columbia*, 82 A.2d 765, 767 (D.C.Mun. App. 1951), *rev'd on other grounds*, 201 F.2d 176 (D.C.Cir. 1952).[20] Rather, the Kentucky statute defines as a vagrant the following types of persons:

"(a) Any able-bodied male person who habitually loiters or rambles about without means to support himself, and who has no occupation at which to earn an honest livelihood; or

"(b) Any able-bodied male person without visible means of support who habitually fails to engage in honest labor for his own support or for the support of his family, if he has one; or

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[19] See Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 Yale L.J. 1351, 1351-1352 (1950); Douglas, *op. cit. supra* note 17, at 6; Lacey, *op. cit. supra* note 17, at 1217-1219.

For a summary of state legislation, see Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L.Rev. 102, 108-114 (1962).

[20] In general, this was the purpose of the second stage of vagrancy legislation in England. See Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L.Rev. 102, 105-106 (1962); 3 Stephen, *op. cit. supra* note 18, at 274.

"(c) Any idle and dissolute able-bodied male person who purposely deserts his wife or children, leaving any of them without suitable subsistence or suitable means of subsistence; or

"(d) Any able-bodied person without visible means of support who habitually refuses to work, and who habitually loiters on the streets or public places of any city." Ky. Rev. Stats., § 436.520.[21]

This type of vagrancy statute reflects a moral judgment as to the sort of person described and a conviction that decent members of the community ought not to be subjected to undue contact with such ne'er-do-wells. But, plainly enough, the statute is not of the sort that is designed to permit the police to arrest on suspicion for interrogation.

3. *The arrest was not grounded upon the statute.* Despite the language of the statute, the officers in this case arrested petitioner and his co-defendants as if an "unable to give a good account" statute were in effect. While the officers did make a cursory inquiry into the economic condition of the defendants, the fundamental reason for the arrest was that the officers suspected that the defendants "[w]ere up for no good" (R. 18). See statement of facts, *supra*, pp. 7-10.

That our view of the evidence is accurate in this respect is confirmed by the fact that both the trial court and the Court of Appeals shared it. There is not a word in the opinion of either court relating to whether the officers

[21] Other portions of the state vagrancy legislation are set forth at p. 4, *supra*. They require officers to "keep a watch" for vagrants, to tell them to go to work, and to disperse them when they are loitering, and they also place beggars in the category of vagrants.

had just cause for concluding that the defendants had "habitually loiter[ed] or ramble[d] about without means to support [themselves]," or that they had "habitually fail[ed] to engage in honest labor," or that they had "purposely desert[ed] [their] wi[ves] or children," or that they had "habitually refuse[d] to work." Rather, both courts concluded that the arrest was warranted because of the "suspicious circumstances" and the "suspicious reasons" given by the defendants for their presence on the street. R. 26, 168; 305 F.2d, at 175.

In short, the arrest was justified, both by the police and by the lower courts, upon the theory that there was probable cause to believe that the defendants were "guilty" of a "crime" not defined by the Kentucky statute. Assuming that the "not giving a good account" statutes are constitutional, which is a considerable assumption,[22] surely

[22] It seems quite doubtful that the Fourth Amendment's requirement that there be probable cause, rather than mere suspicion, to believe a person has committed a crime before he may be arrested can be satisfied by the expedient of making it a crime to act suspiciously, so that all that is required in effect is that there be probable cause to be suspicious. See Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 Yale L.J. 1351 (1950); Douglas, *op. cit. supra* note 17, at 9; Foote, *op. cit. supra* note 18, at 613-615; Lacey, *op. cit. supra* note 17, at 1217-1218; *Stoutenburgh* v. *Frazier*, 16 App. D.C. 229 (1900) ("suspicious person" vagrancy provision unconstitutional). It is quite common, however, as the commentators cited above point out, for the police to use vagrancy statutes in order to arrest on suspicion for interrogation. While that is plainly what happened in this case, it is not necessary, as we have noted, for the Court to consider the constitutionality of the statutes apparently authorizing this practice, because the statute in this case is not of that type.

It may be observed, however, that our suggestion as to the invalidity of "suspicion" vagrancy statutes does not necessarily extend to arrest-for-investigation statutes if they are hedged with adequate procedural safeguards. Such legislation would present a closer question. The particular vice of "suspicion" vagrancy laws is that there are no procedural safeguards, such as a limitation on the period of detention and the right to call counsel or family, and also that they make it a *crime* to act suspiciously.

where there is no such statute or its equivalent a "preventive" arrest cannot be valid.

4. *Assuming the arrest was grounded upon the statute, there was no probable cause.* If it be assumed that the arrest was really grounded upon the officers' belief that the men were vagrants within the meaning of the statute, nonetheless the arrest was invalid because there was no probable cause supporting such a belief.

For Fourth Amendment purposes, the dividing line with respect to arrests, with or without warrants, is between suspicion, on the one hand, and a judgment based upon "facts and circumstances [which would] warrant a prudent man in believing that the offense has been committed," on the other. *Henry* v. *United States*, 361 U.S. 98, 102 (1959). Even "strong reason to suspect" is not enough. *Id.*, at 101. See also, *e.g.*, *Carroll* v. *United States*, 267 U.S. 132, 161-162 (1925). Moreover, "[w]hether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained." *Wong Sun* v. *United States*, 371 U.S. 471, 479 (1963). Thus, the question in this case is, as it was in *Wong Sun*, "whether the officers could, on the information which impelled them to act, have procured a warrant for the arrest of [defendants]." *Id.*, at 480.

The relevant facts which the officers could have presented to a magistrate were merely that petitioner and one of the other men were unemployed at the time, that the third man had been unemployed for six months, that they had only 25 cents among them in the car, and that they had been sitting in the car in the business section of the city for about five hours.[23]

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[23] We stretch a point here in favor of the government. In fact, the only basis for believing the men had been parked for five hours

We respectfully submit that it would be genuinely frivolous to suggest that such a showing would have been sufficient for a magistrate to conclude that there was probable cause to believe that these men had "habitually fail[ed] to engage in honest labor," or had "habitually refuse[d] to work," or had "habitually loiter[ed] or ramble[d] about," within the meaning of the Kentucky statute.

Apart from all other factors relevant to this question, consideration of the word "habitually" as it appears in each subsection demonstrates our point. This word makes explicit what has been the general view of the courts as to an essential characteristic of the "status crime" of vagrancy, *i.e.*, that a pattern of action must be established before the crime is proved. Thus, persons become vagrants because of "many specific acts which make up their general course of conduct . . . in contradistinction to their committing a specific act." *Parshall* v. *State*, 62 Tex.Cr.App. 177, 138 S.W. 759, 766 (1911). And "the idleness and wandering about described in our vagrancy statute is aimed at a mode of life, and certainly not at one isolated instance of idleness of only a few hours duration at most." *Brooks* v. *State*, 33 Ala.App. 390, 34 So.2d 175, 177 (1948). See, generally, Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L. Rev. 102, 114-116 (1962), and cases there cited, and other sources cited in note 17, *supra*.

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was the word of an unidentified informant with whom, so far as appears, the police had had no previous experience. It is most doubtful that this would have sufficed. See *Wong Sun* v. *United States*, 371 U.S. 471, 480-483 (1963).

In addition, the officers would have had to concede that one of the defendants claimed ownership of the car. And while he did not have title papers with him, surely the presumption must be that a person who is sitting in a car and says he owns it generally is telling the truth, as Sykes was in this case.

As to such a crime, the facts that the officers could have related to a magistrate certainly would have been insufficient to do more than arouse a mere suspicion. The deficiency of such a showing is perhaps best demonstrated by considering the questions the officers did *not* put to the men. Thus, for example, they did not ask about efforts the men had made to secure employment; they did not ask whether they had wives and children; they did not ask what their resources were apart from the 25 cents they had with them; they did not ask how they had occupied themselves since they were out of work; they did not ask why they had lost their jobs; they did not ask how many jobs they had had or to what extent they had been unemployed in the past; and, when they discovered at the station that petitioner had an artificial leg, it apparently never occurred to them that he might not be "able-bodied" within the meaning of the statute.

That these questions were unasked, of course, is perfectly understandable, since it is obvious that at the most the officers were thinking of the vagrancy statute only as an excuse for bringing to the station for questioning persons they thought were acting suspiciously. In such circumstances, as we have indicated, we contend that the statute should not even be considered, but that rather the government should be held to the true reason for the arrest. But even if the statute is considered, the government's position is in no way advanced, because a magistrate could not validly have issued a warrant to arrest the defendants for violation of the Kentucky statute on the basis of the facts known to the officers.

B. The Arrest Was Invalid Because the Vagrancy Statute Is Unconstitutional.

Apart from the consideration of probable cause, we submit that the arrest was invalid because the vagrancy statute itself is unconstitutional on its face.

We take it that, if the case can be disposed of favorably to petitioner on other grounds, the Court will probably not reach this issue, involving as it does the validity of a state statute which is of ancient lineage and which is typical of statutes in many other states. Since the other grounds for reversal appear strong, consequently, we consider it inappropriate to tax the Court with an extended discussion of the constitutionality question.

However, we wish to preserve the issue in the event we are mistaken as to the merit of our other arguments. Moreover, in view of the widespread impact of statutes of this type upon persons ill equipped to mount a constitutional challenge, it is arguable that the normal considerations supporting the deferral of constitutional issues are not persuasive in this case. Therefore, we state our argument, but we do it as briefly as possible.

The vice of the Kentucky statute is that it is unconstitutionally vague. While the Kentucky Court of Appeals sustained the statute against such an attack in *Adamson* v. *Hoblitzell*, 279 S.W.2d 759 (1955), practically without discussion,[24] and while most, but not all, other state court decisions are in accord,[25] it is difficult to see how the *Adamson*

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[24] The relevant portion of the opinion is as follows:

"Some suggestion is made that the entire vagrancy statute is void because it is vague and indefinite. It will suffice to say that substantially similar statutes in other states have been upheld against attacks on the ground of vagueness, indefiniteness and uncertainty. . . ." *Id.*, at 760.

[25] See Annots., 9 A.L.R. 1366, 111 A.L.R. 68; Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 Yale L.J. 1351, 1353 (1950) and cases cited; Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L.Rev. 102, 124-125 (1962) and cases cited; Douglas, *op. cit. supra* note 17, at 7-8, and cases cited. For decisions striking down particular vagrancy statutes, see *In re Newbern*, 53 Cal.2d 786, 350 P.2d 116 (1960); *People* v. *Belcastro*, 356 Ill. 144, 190 N.E. 301 (1934); *Territory of Hawaii* v. *Anduha*,

holding can be squared with the standards established by this Court with respect to the precision required in criminal statutes by the Fourteenth Amendment.[26]

In particular, we rely upon *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939), where the Court struck down as unconstitutionally vague a state statute declaring it a crime to be a "gangster," defined as "Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime. . . ." *Id.*, at 452. The Court phrased the due process requirement as follows:

> ". . . No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in Connally v. General Construction Co., 269 U.S. 385, 391: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a

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31 Haw. 459 (1930), *aff'd*, 48 F.2d 171 (9th Cir. 1931); *Mayor of Memphis* v. *Winfield*, 8 Humph. 707 (Tenn. 1848); *Stoutenburgh* v. *Frazier*, 16 App.D.C. 229 (1900); *People* v. *Alterie*, 356 Ill. 307, 190 N.E. 305 (1934); *City of St. Louis* v. *Gloner*, 210 Mo. 502, 109 S.W. 30 (1908); *cf. Pinkerton* v. *Verberg*, 78 Mich. 573, 584, 44 N.W. 579, 582 (1899).

[26] While each statute, of course, must be judged separately, with respect to the vagueness problem of vagrancy statutes generally see Douglas, *op. cit. supra* note 17, at 7-8; Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L.Rev. 102, 121-125 (1962); Lacey, *op. cit. supra* note 17, 1221-1222; Comment, *Who Is a Vagrant in California*, 23 Cal. L. Rev. 506 (1935).

> statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *Id.*, at 453.

The Court held that, on this standard, the word "gang" was unconstitutionally vague, as was the phrase "known to be a member." The Court also observed that the "generality of the language" of the clause "any person not engaged in any lawful occupation" raised "serious doubts" as to its adequacy. *Id.*, at 458.

Another relevant case is *Edelman* v. *California*, 344 U.S. 357 (1953). There the Court did not reach the "serious constitutional questions" as to the validity of a California vagrancy statute applying to "[e]very . . . dissolute person," because the question had not been properly raised in the state court. *Id.*, at 358-359. Mr. Justice Black, however, joined by Mr. Justice Douglas, thought the issue was properly before the Court, and concluded, "It would seem a matter of supererogation to argue that the provision of this vagrancy statute on its face and as enforced against petitioner is too vague to meet the safeguarding standards of due process of law in this country." *Id.*, at 366. Mr. Justice Black noted in particular the similarity between the California statute and the statute held invalid in *Lanzetta*. *Id.*, at 364 n. 2.

Finally, in *Winters* v. *New York*, 333 U.S. 507 (1948), Mr. Justice Frankfurter, joined by Mr. Justice Jackson and Mr. Justice Burton, while dissenting from the holding that the statute there involved was unconstitutionally vague, observed with respect to *Lanzetta*:

> "The case involved a New Jersey statute of the type that seek to control 'vagrancy.' These statutes are in

> a class by themselves, in view of the familiar abuses to which they are put. . . . Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense. In short, these 'vagrancy statutes' and laws against 'gangs' are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided." *Id.*, at 540.

We submit that, measured by the due process standard applied in *Lanzetta*, the various provisions of the Kentucky statute are invalid.[37] In order to avoid unduly extending this discussion, we consider only one of the various questionable terms in each of the subsections.

Subsection (a) applies to a person who, among other things, "habitually loiters or rambles about." There is no specification of place, time, or purpose, so that, for all that appears, anyone who is indigent is guilty if he "habitually" walks around anywhere in the state; and apparently he cannot escape liability if he stops "rambling," because then he would be "loitering." Surely this is not what the legislature intended; but there is no way to draw a line between what was intended and what was not. Cf. *Territory of Hawaii* v. *Anduha*, 48 F.2d 171 (9th Cir. 1931) (loitering statute unconstitutional).

Subsection (b) applies to persons who do not work for their own support or the support of their family if they are

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[37] "That opinion [*Lanzetta*] certainly casts doubt upon the validity of many of these [vagrancy] statutes, for perhaps the majority of them are framed in language as general as that of the New Jersey act. . . ." Lacey, *op. cit. supra* note 17, at 1222.

It may be noted that most of the state court opinions upholding vagrancy statutes antedated *Lanzetta*. *Ibid.*

also "without visible means of support." While this phrase is admittedly ancient and while it has been widely used, neither age nor usage has clarified its almost hopeless obscurity. What is a "visible" means of support? "Visible" to whom? One would think that cash would qualify, even though carried in one's pocket, but *Branch* v. *State*, 73 Tex. Crim. Rep. 471, 165 S.W.2d 605 (1941), held that it does not. See also *People* v. *Cramer*, 247 N.Y.S. 821, 824, 139 Misc. 545 (1930) (possession of money or lack of it is neither proof positive of visible means of support or the absence of it); *People on Complaint of Moody* v. *Johnaken*, 94 N.Y.S.2d 102, 104, 196 Misc. 1059 (1950) ("Just what constitutes 'visible means of support' is difficult of precise definition or measurement."); and *compare Rex* v. *Munroe*, 25 Ont. L.R. 223, 19 Can.Crim.Cas. 86 (1911) (money obtained by begging not "visible means of support"), *with Rex* v. *Sheehan*, 14 B.C. 13, 14 Can.Crim.Cas. 119 (1908) (money acquired by gambling was "visible means of support"). And to what extent must the "visible means" provide "support"? What of the person who wants little of material things and who works only as the need arises? If he has $5.00 and it will last him a week, has he or has he not "visible means of support"? Or what of the idle son who depends on the largess of his parents?

While one can only speculate about the intent of the Kentucky legislature in using this phrase, it seems likely that in early English statutes this type of language was designed to describe the "rogues and vagabonds" of Elizabethan days who constituted the "brotherhood of beggers" and were easily enough identified. Thus "visible" would mean "known to the community to be lawful." But, as Lord Justice Scott observed in the leading case of *Ledwith* v. *Roberts* [1937], 1 K.B. 232, 276-277 (C.A. 1936), which con-

firmed the shift in England from status criminality to action criminality in vagrancy prosecutions:

> "... It seems to me wrong that these old phrases should still be made the occasion of arrest and prosecution, when ... [t]he class against which the legislation was directed has ceased to exist. ... The old phrases have to-day lost their meaning, but they remain on the Statute Book as vague and indefinite words of reproach. ... Clear and definite language is essential in penal laws."

As to subsection (c), which relates to men who desert their families, we need raise no question since plainly it is not involved in this case. However, we observe that it applies only to those who are "idle and dissolute," terms which, we submit, simply defy any reasonably particular definition. See *Edelman* v. *California*, 344 U.S., at 364-365.

Finally, subsection (d) suffers from the same type of infirmity as subsection (a) in that it applies to persons who "habitually loiter." It is true that this subsection is somewhat narrower than subsection (a) in that at least it requires loitering "on the streets or public places"; but this is not sufficient to advise a person without work anything except that, if he spends any substantial amount of time outside his home without any particular purpose, he may be arrested. Again, the legislature should not be assumed to have legislated with a view toward simply excluding paupers from the streets if they refuse to work; but this is the sweep of the statute, so far as the language provides any guidance.

Finally, apart from the vagueness issue, we submit that the state may not, without running afoul of the Eighth Amendment's ban on cruel and unusual punishment as made applicable through the Fourteenth Amendment, pun-

ish a person criminally simply for acquiring the status of one who habitually refuses to work and thereby becomes a pauper. Cf. *Ex Parte Hudgins*, 86 W.Va. 526, 103 S.E. 327 (1920) (vagrancy statute which applied to any able-bodied man between 16 and 60 who did not work 36 hours a week unconstitutional). To be sure, a state may undoubtedly legislate in many ways to cope with the problem of persons becoming public charges through their own deliberate actions. Presumably public relief could be withheld except on condition that they seek gainful employment, for example; or acceptance of relief without genuinely attempting to secure a job might be made a crime. But the power asserted by the state in the Kentucky statute appears quite similar to that denied to California by this Court in *Robinson* v. *California*, 370 U.S. 660 (1962), where the Court struck down as cruel and unusual punishment a state's criminal sanction upon narcotics addiction. Just as there is nothing intrinsically evil about narcotics addiction, though there may be about the things one does in becoming an addict or after he is one, *id.*, at 666-667, so too there is nothing intrinsically evil about being a pauper, even willingly, though one may commit anti-social acts in part because he is one. As in *Robinson*, it is the *act* that is the appropriate subject of sanction, not the condition.

III.

Assuming Arguendo the Validity of the Arrest, the Search and Seizure Were Nonetheless Invalid.

Even if it be assumed that the arrest was legal, the search and seizure without a warrant were nonetheless invalid because not within the incident to arrest exception to the warrant requirement nor within the exception pertaining to movable vehicles.

A. The Search and Seizure Cannot Be Justified on the Basis of the Doctrine of Carroll v. United States.

While this Court has sanctioned searches of automobiles without warrants even prior to arrest, this principle is applicable only where the officers have probable cause to believe that the car contains contraband (or perhaps other permissible objects of seizure) and "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Carroll* v. *United States*, 267 U.S. 132, 153 (1925). See also *Husty* v. *United States*, 282 U.S. 694 (1931); *Scher* v. *United States*, 305 U.S. 251 (1938); *Brinegar* v. *United States*, 338 U.S. 160 (1949).

Here, the officers had no probable cause to believe any proper object of seizure was in the car, nor even that any incriminating evidence was there.[28] There is no suggestion in the record that the interrogation of the defendants disclosed anything beyond what the officers knew when they made the arrests, and, as we have indicated, that amounted to practically nothing. Certainly the officers could not have obtained a search warrant, for they could not have made a sworn showing as to the likelihood that particular objects which the state had a right to seize were in the car.

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[28] The Court has consistently held that a search, with or without a warrant, may not be made for articles that are "merely evidentiary," but that rather the objects of search must be "the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the prisoner arrested might be effected, and property the possession of which is a crime." *Harris* v. *United States*, 331 U.S. 145, 154 (1947) [footnote omitted]. See also *Boyd* v. *United States*, 116 U.S. 616 (1886); *Gouled* v. *United States*, 255 U.S. 298, 309 (1921); *Agnello* v. *United States*, 269 U.S. 20, 30 (1925); *Carroll* v. *United States*, 267 U.S. 132, 158 (1925); *Marron* v. *United States*, 275 U.S. 192, 198-199 (1927); *United States* v. *Lefkowitz*, 285 U.S. 452, 465-466 (1932); *Abel* v. *United States*, 362 U.S. 217, 237-239 (1960).

Moreover, inasmuch as the car was in the custody of the police, as well as all of the men who had been in it, it could hardly be argued that the car could "be quickly moved out of the locality or jurisdiction."

In short, the *Carroll* doctrine is inapplicable, so that the search and seizure must be justified, if at all, on the basis of the incident to arrest doctrine.[29]

B. Where the Arrest Is for Vagrancy, No Incidental Search Should Be Permitted Beyond That Necessary to Protect the Officers and to Prevent Escape.

With respect to the incident to arrest exception to the warrant requirement, where the arrest is for vagrancy the type of search here involved cannot be justified. More particularly, we submit that, in connection with such an arrest, the only type of search that is permissible without a warrant is that which is designed to protect the arresting officers and to make the arrest effective. Thus, while the officers may have the right to search the person arrested (and perhaps at the same time to search an automobile if the person is arrested in it) in order to uncover weapons or other possible means of escape or attack, they have no right to conduct a search that is broader in any respect.

This limitation upon the right to search incident to arrest arises from the analysis by this Court of the nature of that right. So far as we have discovered, the Court has never deviated from, nor expanded upon, the statement in *Agnello v. United States*, 269 U.S. 20, 30 (1925), as to the purpose to be served by a search incident to arrest, namely, "in order to find and seize things connected with the crime as its fruits

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[29] It perhaps is worth noting specifically that the plain implication of the *Carroll* line of decisions is that the protection of the Fourth Amendment extends to searches of automobiles. See also cases cited *infra*, pp. 51-53.

or as the means by which it was committed, as well as weapons and other things to effect an escape from custody." 269 U.S., at 30. See *Weeks* v. *United States*, 232 U.S. 383, 392 (1914); *Marron* v. *United States*, 275 U.S. 192, 198-199 (1927); *United States* v. *Lefkowitz*, 285 U.S. 452, 465 (1932); *Harris* v. *United States*, 331 U.S. 145, 153 (1947); *United States* v. *Rabinowitz*, 339 U.S. 56, 61-64, 64 n. 6 (1950); *Abel* v. *United States*, 362 U.S. 217, 237 (1960).

Where the officers' purpose has been broader, so that the search was for any evidence that would incriminate the person arrested, the Court has consistently held the search and seizure unconstitutional as the type of general search that the Fourth Amendment was designed to prevent. See, *e.g.*, *Boyd* v. *United States*, 116 U.S. 616, 625-629 (1886); *Weeks* v. *United States*, *supra*, at 393-394; *Go-Bart Co.* v. *United States*, 282 U.S. 344, 357 (1931); *United States* v. *Lefkowitz*, *supra*, at 465; *Kremen* v. *United States*, 353 U.S. 346 (1957). Cf. *Wong Sun* v. *United States*, 371 U.S. 471, 481 n. 9 (1963). See also *Harris* v. *United States*, *supra*, where the officers uncovered certain articles that were the means of committing a crime other than the one for which the individual had been arrested, and where the Court upheld the seizure in part on the ground that the motive of the search had not been to find such items. Rather, "[t]he search was not a general exploration but was specifically directed to the means and instrumentalities by which the crimes charged [in the arrest] had been committed . . . ." 331 U.S., at 153. For a similar decision, see *Abel* v. *United States*, *supra*, at 238.

Applying this standard to searches and seizures incident to arrests for vagrancy, it seems evident that nothing beyond a search for weapons and means of escape can be justified, since it could hardly be contended that such a search is designed to uncover the "means or instrumentali-

ties" for committing, or the "fruits of," the crime of vagrancy. In this respect the concurring judge in the Court of Appeals was correct, 305 F.2d, at 177; although it is difficult to understand what led him to join in the judgment unless it was the impermissible consideration that the search actually turned up incriminating evidence.

Petitioner's argument is supported by *White* v. *United States*, 271 F.2d 829 (D.C. Cir. 1959). At issue in that case was the legality of a search of a person who was arrested for vagrancy and the seizure from him of certain items tending to establish the different crime of which he was ultimately convicted. Judge Fahy, writing for the court, held that the action of the officer in requiring petitioner to disrobe in a doorway (obviously because he thought defendant might have narcotics in his possession) was unconstitutional. "It was quite unjustified by any necessity to prevent the destruction of evidence, to prevent flight, or by any other good reason." *Id.*, at 831. See also *People* v. *Molarius*, 146 Cal. App. 2d 129, 303 P.2d 350, 351 (1956), where the court held:

> "The search, which . . . was of an automobile in which appellants were traveling at the time of their arrest, was made without a warrant. Obviously, the search [which uncovered narcotics] bore no relation to the traffic violation nor to the vagrancy charges upon which appellants were booked and, therefore, was not justified as incidental to the arrest therefor. . . ."

And cf. *Charles* v. *United States*, 278 F.2d 386, 388 (9th Cir. 1960), where the court stated that, with respect to a search of premises, "When a search [for narcotics] has nothing to do with the arrest [for assault], it cannot be deemed incident to the accused's apprehension."

The situation in the case at bar is closely analogous to searches incident to arrests for minor traffic violations. While the state courts are not in agreement as to the proper scope of such a search, the better reasoned opinions restrict it at least to a search of the person.[30]. See *People* v. *Mayo*, 19 Ill. 2d 136, 166 N.E.2d 440 (1960); *People* v. *Zeigler*, 358 Mich. 355, 100 N.W.2d 456 (1960); *Brinegar* v. *State*, 97 Okla. 299, 262 P.2d 464 (1953); *Elliott* v. *State*, 173 Tenn. 203, 116 S.W.2d 1009 (1938); *People* v. *Molarius*, *supra*; cf. *People* v. *Sanson*, 156 Cal. App. 2d 350, 319 P.2d 422, 424 (1957); *People* v. *Blodgett*, 46 Cal. 2d 114, 293 P.2d 57, 58 (1956). Indeed, the Illinois Supreme Court, in an opinion by Justice Schaeffer, concluded that in normal circumstances such an arrest does not even justify a search of the driver. *People* v. *Watkins*, 19 Ill. 2d 11, 166 N.E.2d 433, 437 (1960). As the court stated the rationale in *People* v. *Gonzales*, 356 Mich. 247, 97 N.W.2d 16, 20 (1959), where the arrest had been for driving with only one headlight burning:

> "There were no fruits of the traffic offense to search for, nor any need to search for the means by which it had been committed. And since no further detention was contemplated, there was no need to search for weapons or other means of possible escape from custody."

The case at bar underscores the necessity for requiring that incidental searches be related to the crime for which the arrest is made. The exploratory character of the search by the officers is plain. They surely could not have secured

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[30] For general discussions and citations to opposing authorities, see Note, *Search Incident to Arrest for Traffic Violations*, 6 Wayne L.Rev. 413 (1960); Simeone, *Search and Seizure Incident to Traffic Violations*, 6 St. Louis L.J. 506 (1961); 1 Varon, *Searches, Seizures and Immunities*, 107-108 (1961).

a search warrant prior to their discovery of the weapons, for they had no basis whatsoever to support a belief that particular items that the government might have a right to seize would be in the car.[21] Nor, for that matter, did they have that sort of information even after they had discovered the guns, since at that point they had secured no evidence that the defendants were planning a robbery. To be sure, after Sykes had confessed, the officers might have been able to obtain a warrant—but the point is, of course, that they were not content to wait until they could satisfy a magistrate. Rather, they went ahead with the search on the basis of their own suspicion, and when they found the incriminating evidence they used it as a lever to pry a confession out of Sykes.

C. Even Assuming That A Broader Search May Be Made Incident To An Arrest For Vagrancy, In This Case The Search And Seizure Were Not Incident To The Arrest.

If it be assumed that, even though the arrest was for vagrancy, the search could be of the same scope as where the arrest is for other crimes, the search and seizure in this case were nonetheless invalid.

1. *The search and seizure were not closely enough related to the arrest in terms of time and place.* A fatal de-

[21] And it cannot be contended, we submit, that the discovery of the guns was not the product of a "search" within the meaning of the Fourth Amendment. Whatever the officers' intent may have been at the outset in searching the car, they were on notice as a matter of law that this was a citizen's property as to which they were required to adhere to the requirements of the Fourth Amendment. Moreover, it is difficult to believe that the officers were so solicitous of the defendants that, when one asked for cigarettes, they commissioned *three* officers to go to the car to find some. Plainly enough, the purpose was to search for evidence; as one of the officers indicated. See statement of facts, *supra*, p. 11.

fect in the search and seizure in the case at bar is that they were not closely enough related to the arrest in terms of time and place. This Court has never deviated from the rule that, for a search and seizure to be incident to an arrest, the events must take place contemporaneously and at the same place. Thus, in *Weeks* v. *United States*, 232 U.S. 383 (1914), the Court held invalid a search of a person's home without a warrant where he had been arrested earlier in the day while on his job. And in *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920), the Court regarded as unconstitutional a search of an office that took place after an arrest in the suspects' homes. This line of authority culminated in *Agnello* v. *United States*, 269 U.S. 20 (1925), where the Court struck down as unconstitutional a search of a house several blocks from the place of arrest immediately following the arrest. As the Court put it, while where there is an arrest there is also a right to search "contemporaneously" "the place where the arrest is made," that right "does not extend to other places." *Id.*, at 30.[22]

By this test, the search and seizure in the case at bar do not fall within the incident to arrest exception. The search and seizure occurred not at the place of arrest, but at a garage to which the auto had been towed; and it took place

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[22] For lower court decisions applying this time and place rule, see, *e.g.*, *Mosco* v. *United States*, 301 F.2d 180 (9th Cir. 1962); *Hershkowitz* v. *United States*, 65 F.2d 920 (6th Cir. 1933); *Papani* v. *United States*, 84 F.2d 160, 163 (9th Cir. 1936); *United States* v. *Lee*, 83 F.2d 195, 196 (2d Cir. 1936); *United States* v. *Stappenback*, 61 F.2d 955 (2d Cir. 1932); *Hurst* v. *State of California*, 211 F.Supp. 387, 392 (N.D. Cal. 1962); *United States* v. *Royster*, 204 F.Supp. 760, 762 (N.D. Ohio 1961); *United States* v. *Rutheiser*, 203 F.Supp. 891, 892 (S.D. N.Y. 1962); *United States* v. *Steck*, 19 F.2d 161, 162 (W.D. Pa. 1927); *United States* v. *Swan*, 15 F.2d 598, 599 (N.D. Cal. 1926); *United States* v. *Vallos*, 17 F.2d 390, 392 (D. Wyo. 1926); *United States* v. *Fowler*, 17 F.R.D. 499, 501 (S.D. Cal. 1955).

not contemporaneously with the arrest, but from 15 to 30 minutes after the arrest—a time lapse which arguably might be overlooked if the men were still at the scene of the arrest, but which in this case represents the time taken to remove the men to the station, book them, search them, and begin interrogation. See *Ker* v. *California*, 374 U.S. 23, 42 n. 13 (1963) ("In cases in which a search could not be regarded as incident to arrest because the petitioner was not present at the time of the entry and search, the absence of compelling circumstances . . . supported the Court's holdings that searches without warrants were unconstitutional.") See also *Lustig* v. *United States*, 338 U.S. 74, 79-80 (1949).

2. *There was time for the officers to obtain a warrant.* The general rule of the Fourth Amendment is, of course, that the government cannot search or seize without the authority of a search warrant. In *Trupiano* v. *United States*, 334 U.S. 699 (1948), the Court held that this policy was so important that a search at the time of arrest was invalid, insofar as it extended beyond the person arrested and objects within his actual physical control, because there had been ample time to secure a warrant. While this requirement was subsequently rejected in *United States* v. *Rabinowitz*, 339 U.S. 56 (1950), in favor of a more flexible test as to the reasonableness of a search and seizure, we suggest that under *Rabinowitz* the failure to secure a warrant may still be decisive in appropriate circumstances, and, more particularly, that it should be considered decisive in this case.

In *Rabinowitz*, the Court held that "[t]o the extent that *Trupiano* v. *United States*, 334 U.S. 699, requires a search warrant *solely* on the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled." *Id.*, at 66 (emphasis supplied). And in *Ker* v. *California*, 374 U.S. 23, 41

(1963), the Court observed that, under *Rabinowitz*, "The practicability of obtaining a warrant is not the *controlling* factor . . . ." (Emphasis supplied.) The implication appears to be that failure to secure a warrant may or may not be important, depending on the circumstances.

This interpretation of *Rabinowitz*, which was adopted in *Rent* v. *United States*, 209 F.2d 893, 899 (5th Cir. 1954), and in *Clay* v. *United States*, 239 F.2d 196, 204 (5th Cir. 1956), is supported not only by the language employed by the Court, but also by the general tenor of the *Rabinowitz* opinion. In the first place, it would be difficult to square the broad *Rabinowitz* approach to Fourth Amendment questions, under which a variety of considerations are relevant, with an absolute rejection of the relevance of the failure of the police to secure a warrant where there was ample opportunity, especially in view of the emphasis this Court has placed upon this consideration in other decisions. See *Go-Bart Co.* v. *United States*, 282 U.S. 344, 358 (1931); *Taylor* v. *United States*, 286 U.S. 1, 6 (1932); *McDonald* v. *United States*, 335 U.S. 451, 454-455 (1948); *United States* v. *Jeffers*, 342 U.S. 48, 51-52 (1951); and *Chapman* v. *United States*, 365 U.S. 610 (1961).

Moreover, in *Rabinowitz* the Court appeared to be concerned principally with the problems involved in second-guessing the police as to whether it had in fact been "practicable" to secure a warrant. 339 U.S., at 65. But while this may be undesirable in the general run of search incident to arrest cases, at the same time there may well be cases in which it is indisputably clear that the police could have secured a warrant without impairing their effectiveness in enforcing the law. In such a situation, the practical considerations that troubled the Court in *Rabinowitz* are not present, and in consequence the general rule of the

Fourth Amendment that a warrant be secured should be followed.

In the case at bar, of course, it requires no argument to establish that the officers had every opportunity to secure a warrant. With the car in their custody and its former occupants in jail, it is difficult to imagine any excuse for not obtaining a warrant—apart from the consideration that a magistrate would have refused one—except perhaps "inconvenience of the officers and delay in preparing papers and getting before a magistrate. . . . But these reasons are no justification for by-passing the constitutional requirement. . . ." *McDonald* v. *United States, supra,* at 455.

3. *Lower court decisions support petitioner.* While it cannot be said that the decisions of the lower federal courts are entirely in harmony with respect to the right of officers to search cars incident to arrests, the most persuasive of those decisions are those which adhere to the principles outlined above with respect to the practicability of securing a warrant and the relationship in time and place of the search to the arrest.

Thus, in *United States* v. *Stoffey,* 279 F.2d 924 (7th Cir. 1960), the court held illegal a search of an automobile that was parked outside the building in which the arrest was made. The arrest took place only five minutes before the search of the auto, although the person arrested had effectively been in the control of the officers from the time he walked into the building about 3 hours before the arrest. The court stated:

> "It is clear that from 11:50 A.M. [when he entered] until 2:50 P.M. [when he was arrested] this automobile was immobile. . . . While he had the keys to the car in his possession until 2 P.M., he could not get out of the tavern to get into the car. . . . The agents had no search warrant for the car. They had plenty of time

to secure a search warrant. The seizure of the car was not incidental to the arrest of defendant. The arrest both in fact and in law was consummated before the car was seized. There was no risk of the car being driven away while a search warrant was being obtained.

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" . . . We are not here confronted with an arrest of defendant in his automobile. Neither are we confronted with a case where law enforcing officers find it necessary to make a search in a moving automobile or one which has been temporarily halted and which may be moved away by the occupant at any moment. . . . " *Id.*, at 928-929.

To the same effect is *Rent* v. *United States*, 209 F.2d 893 (5th Cir. 1954), where, after arresting the suspect while in the car, the police took the car into custody for the purpose of searching it, but did not actually make the search until after a lapse of 10 hours. The court held that the search had not been contemporaneous with the arrest within the *Agnello* rule, and also that the officers "had ample opportunity to apply for a search warrant." *Id.*, at 899. As the court observed, the reason for distinguishing between cars and houses did "not exist in this case. The automobile was at rest, was actually in the custody of the officers, locked, and not likely to be disturbed." *Id.*, at 897.

Even closer to the facts of the present case, perhaps, is *Shurman* v. *United States*, 219 F.2d 282 (5th Cir. 1955). There, the court held that a search was unconstitutional where the officer had arrested the suspects after stopping their car on the highway, had taken them to a justice of the police court to leave them in the custody of another officer,

and had returned to search the car. The court was of the view that, as in *Rent*, "[t]he lack of a warrant could not be excused, either under the principle of search incident to arrest, the search and the arrest not having been contemporaneous; or under Carroll v. United States . . . because the danger that the automobile might be quickly moved from the locality . . . was lacking under these circumstances." *Id.*, at 286. See also *Clay* v. *United States*, 239 F.2d 196, 204 (5th Cir. 1956); *Mosco* v. *United States*, 301 F.2d 180, 184, 188 (9th Cir. 1962); *Weaver* v. *United States*, 295 F.2d 360 (5th Cir. 1961); *United States* v. *Kidd*, 153 F.Supp. 605, 610 (W.D. La. 1957).

4. *The crime of vagrancy was not committed in the presence of the officers.* The fact that no crime of vagrancy was actually committed in the officers' presence also appears to be relevant to the question of the reasonableness of the search and seizure.

This Court has consistently regarded the question whether a crime was committed in the presence of the arresting officers as an important consideration in judging the constitutionality of a contemporaneous search and seizure. See *Agnello* v. *United States*, 269 U.S. 20, 30 (1925); *Go-Bart Co.* v. *United States*, 282 U.S. 344, 357 (1931); *McDonald* v. *United States*, 335 U.S. 451, 462-463 (1948) (dissenting opinion); *Harris* v. *United States*, 331 U.S. 145, 155 (1947); *United States* v. *Rabinowitz*, 339 U.S. 56, 64 (1950); *Marron* v. *United States*, 275 U.S. 192, 198-199 (1927); *United States* v. *Lefkowitz*, 285 U.S. 452, 463, 465 (1932).

In the case at bar, consequently, assuming *arguendo* the correctness of the lower court's view that the question whether the defendants actually committed the crime of vagrancy in the officers' presence is irrelevant to the legality of the arrest, see discussion *supra*, pp. 25-27, this does not

mean that this question is irrelevant to the legality of the search and seizure. And if the question is to be answered on the basis of the facts of record, there can be little doubt not only that the crime of vagrancy, as defined in the statute, was not proved, but that in fact it was not committed. As we have indicated in the statement of facts, *supra*, pp. 13-14, the testimony of the defendants was undisputed that they all had families, that they all had trades, and that, while they were temporarily out of work, they all had tried to secure employment. Moreover, petitioner not only had an artificial leg but had been recently injured; and his testimony as to his injuries and as to his diligent efforts to secure employment were corroborated by the testimony of the person in whose house he was residing.

IV.

Petitioner Was Deprived of Effective Assistance of Counsel.

There is yet one additional constitutional flaw in the judgment against petitioner that, because of its character, we feel obliged to call to the Court's attention, even though it was raised neither at trial nor upon appeal. That defect is that petitioner was deprived of his Sixth Amendment right to effective assistance of counsel.

As we have noted, two counsel were appointed by the trial judge to represent the three defendants jointly (R. 5), and that is what they did. The difficulty with this arrangement was that, in view of the diversity of interests among the defendants, this joint representation was at odds with the principle established in *Glasser* v. *United States*, 315 U.S. 60 (1942), that "the Sixth Amendment contemplates that such assistance [of counsel] be untrammeled and unim-

paired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." *Id.*, at 70.

It seems most doubtful that, in the normal case of joint representation by court-appointed counsel, any specific showing of probable prejudice should be required, at least unless it appears on the surface that the defendants were identically situated. As the Court observed in *Glasser*, "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice resulting from its denial." *Id.*, at 76. In any event, it is quite clear in the case at bar both that the interests of the defendants were disparate and that petitioner's defense was adversely affected by the joint representation.

The evidence against petitioner, as we have indicated, see *supra*, pp. 16-18, was weak, but the evidence against Sykes was much stronger. The incriminating articles had been seized in the trunk and glove compartment of his car, and he had confessed. Consequently, one obvious approach for petitioner's counsel would have been to disassociate petitioner from Sykes, even at the cost of weakening Sykes' defense.

For example, Sykes had confessed to two different versions of the robbery plan, one of which implicated petitioner and Strunk (R. 145-148) and one of which did not (R. 140-144). Petitioner's counsel could have stressed the confession that did not involve petitioner, and in addition he could have attacked Sykes' credibility in general. But either of these courses would have undermined Sykes' defense, especially in view of his disavowal of both confessions when he took the stand. Moreover, it is doubtful that petitioner's defense was aided by counsels' efforts to establish that no one in the car knew about the articles in the trunk (R. 190, 224-226); but they could not suggest the most reasonable explanation

—that the owner of the car put them there—without disadvantaging their client Sykes.

Counsels' dilemma is perhaps best demonstrated by the manner in which they attempted to deal with Sykes' testimony during their closing argument. They said:

> "... Now, my own impression here is that we had a little fish in a big puddle making a big noise. You can make up your own mind as to whether or not Mr. Sykes was telling the truth [to the police and the FBI] or whether he was telling a falsehood. You heard him testify from the stand, you know his character, you can recognize his propensities from what he has said and from what the evidence has shown. I think possibly that this confession and everything that has been connected with it was best characterized in the statement of another witness, the other defendant, Mr. Strunk, who said sometimes his brother-in-law has some pretty grandiose ideas" (R. 261-262).

This reflects an acute awareness of the necessity for attacking Sykes, tempered by the realization that, in the circumstances of the joint representation, the attack had to be framed in such a way as not to injure him.

Additional examples could be cited, but the foregoing appear sufficient to establish the existence of a conflict of interests and the probability of prejudice. It may be observed in addition, however, that this was a conspiracy trial, and that in such a proceeding, as the Court pointed out in *Glasser*, "where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, it is especially important that he be given the benefit of the undivided assistance of his counsel. . . ." 315 U.S., at 76.

As we have indicated, this issue has not been raised in this case until this point.[33] However, the error was, we submit, plain. Moreover, it is in no sense a mere technicality. Rather, especially in the circumstances of this case where the proof against petitioner was hardly conclusive, deprivation of the right to counsel has a direct bearing upon the correctness of the verdict of the jury. Consequently, since there is no jurisdictional barrier to this Court's considering the question, we respectfully urge that it do so if it develops that otherwise the judgment of conviction would be affirmed.

V.

Conclusion

What happened in this case was precisely what the Fourth Amendment was designed to prevent. The officers arrested three men sitting in a car on a main street because the officers thought they were "evasive" in responding to questions. On any realistic appraisal of the record, it is clear enough that the officers simply wanted the opportunity to question the men more closely in the environment of the police station. When the initial interrogation was not productive, the officers decided upon searching the car on the chance that they would find something—anything. When they did, they were able to elicit an incriminating statement from one defendant. From start to finish, the officers acted on sus-

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[33] It may be noted that the counsel appointed for trial also represented the defendants on the appeal. See 305 F.2d, at 173.

Except as it might be said that counsel had an obligation to raise the conflict of interests issue, we do not suggest that they were ineffective. To the contrary, the record discloses that they were experienced and intelligent counsel. If, for Sixth Amendment purposes, blame must be placed, it falls as much on the trial judge, who should have recognized the obvious conflict of interests, as it does upon trial counsel, and perhaps more. At any rate, wherever the blame is placed, it cannot be upon petitioner.

picion alone without the sanction of a magistrate's determination.

Indeed, even after the police had made a clean sweep of Fourth Amendment safeguards, they were able only to secure enough evidence to prosecute petitioner, not for robbery or even for attempted robbery, but for conspiracy to rob. The jury was turned loose upon a mass of ambiguous and conflicting evidence and was asked to determine whether the defendants simply talked about robbery or whether they actually agreed to rob a particular bank. They came up with a verdict against the defendants, but it is difficult to escape the feeling that, just as the police acted on suspicion throughout, so did the jury.

In these circumstances, we submit that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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